

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-CR-275-FL
NO. 5:11-CV-687-FL

GABRIELE SECREST,)
)
 Petitioner,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)

ORDER

Petitioner filed motions to vacate under 28 U.S.C. § 2255 on December 1, 2011, and December 23, 2011 (DE # 27, 30). The government filed motion to dismiss or in the alternative motion for summary judgment on February 29, 2012, (DE #38), to which petitioner did not respond. Magistrate Judge William A. Webb entered memorandum and recommendations on October 19, 2012, recommending that the government's motion to dismiss be granted as to grounds three and four of the motion to vacate, and that the motion for summary judgment be granted as to grounds one and two of the motion to vacate. (DE #41). Petitioner did not object to the memorandum and recommendations, but instead filed on December 12, 2012, a motion to voluntarily dismiss. (DE #43).

An action may be dismissed voluntarily by the plaintiff without order of the court by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment. See Fed. R.Civ. P. 41(a)(1). Otherwise an action shall not be dismissed on the plaintiff's request except upon an order of the court. See Fed. R.Civ. P. 41(a)(2).

In this case, the government filed a motion for summary judgment. Because the government filed such a motion, plaintiff's action may only be voluntarily dismissed pursuant to Rule 41(a)(2), which permits voluntary dismissal "on terms that the court considers proper." A plaintiff's motion under Rule 41(a)(2) should not be denied absent substantial prejudice to the defendants. S.A. Andes v. Versant Corp., 788 F.2d 1033, 1036 (4th Cir. 1986).

As grounds for her motion, plaintiff states that she did not reply to the government's motion to dismiss the § 2255 motion to vacate, and that she thought that her motion had already been dismissed. She states that she does not wish to dispute or continue with a § 2255 motion, wishes to have the case closed, and wishes to serve her sentence as imposed. The court finds these reasons to be consistent with Rule 41(a)(2), and no substantial prejudice to the defendants is raised. Accordingly, plaintiff's motion for voluntary dismissal (DE # 43) is GRANTED, and this action and the § 2255 motion is DISMISSED, and the remaining pending motions are DENIED as moot.

SO ORDERED, this the 26th day of December, 2012.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is written in a cursive, flowing style.

LOUISE W. FLANAGAN
United States District Judge